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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

JUL - 8 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Amendment of Part 1 of the ) WT Docket No. 97-82  
Commission's Rules — )  
Competitive Bidding Proceeding )

To: Acting Chief, Wireless  
Telecommunications Bureau

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### SUMMARY

Cook Inlet Region, Inc., Cook Inlet Western Wireless PV/SS PCS, L.P., Western Wireless Corporation, AirGate Wireless, L.L.C., Aerial Communications, Inc., TeleCorp, Inc., and Airadigm Communications, Inc. (collectively "Joint Commenters") demonstrated in their Comments in this proceeding that only strict enforcement of the Commission's competitive bidding installment payment rules will serve the public interest. The other Comments filed in this proceeding underscore this reality.

As a threshold matter, the Joint Commenters note that many of the parties seeking relief from the Commission in advance of the March, 1997, payment deadline have abandoned their earlier proposals for help. Instead of reiterating the proposals for new payment dates made in March, many overextended bidders now ask the Commission to write off most of their bid amounts or to fundamentally alter the C block ownership rules. Some parties acknowledge their previous filings, while many others act as though their current proposal is their first proposal. In either case, the Joint Commenters urge the Commission to be skeptical of these rapidly shifting demands for relief.

The Joint Commenters also urge the Commission to examine carefully whether there has truly been a "market meltdown" that affected some overextended bidders, or whether these bidders simply overestimated the market for wireless issues. Just last week, a wireless industry trade journal reported that wireless stocks are now in resurgence, highlighting the volatility of the

wireless market and suggesting that bidders should anticipate that markets move both up and down. Moreover, notwithstanding the claims by some parties that "circumstances have changed," warranting a review of the Commission's rules, the factors about which these bidders complain were known or knowable in advance of the C block auction. The Commission's rules should not evolve each time a bidder becomes overextended.

This is particularly the case where the Commission lacks both the statutory authority and the financial expertise to grant the relief now being requested. The Debt Collection Act limits the authority of any executive agency to compromise a claim owed to the United States in excess of \$100,000, and the agency must take aggressive action to collect the claim in advance of any such compromise. In addition to this statutory limitation, the Commission itself has denied having the financial expertise to assess business plans and undertake financing negotiations. This is not the basis on which the Commission should forego the enforcement of its rules.

Finally, the Joint Commenters oppose the availability of an Amnesty Day, during which overextended bidders simply could return licenses with little or no penalty. Many C block licensees have committed millions of dollars to constructing broadband PCS networks, having heeded the Commission's warnings to factor build-out costs into their bid amounts. The Commission should validate the choices of these bidders, not those of parties who bid more than they could pay.

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**REPLY COMMENTS**

Cook Inlet Region, Inc. ("CIRI"), Cook Inlet Western Wireless PV/SS PCS, L.P. ("Cook Inlet PCS"), Western Wireless Corporation ("Western Wireless"), AirGate Wireless, L.L.C. ("AirGate Wireless"), Aerial Communications, Inc. ("Aerial"), TeleCorp, Inc. ("TeleCorp"), and Airadigm Communications, Inc. ("Airadigm") (collectively "Joint Commenters") submit these Reply Comments in response to the Public Notice, DA 97-679, issued by the Wireless Telecommunications Bureau on June 2, 1997.

**I. INTRODUCTION**

In their Comments in this proceeding, the Joint Commenters demonstrated that only strict enforcement of the Commission's competitive bidding installment payment rules will serve the public interest. Time and again, the Commission has ruled that adherence to its spectrum auction rules must take priority over the specific financing problems of auction participants. With careful pronouncements to that effect before, during, and after the broadband personal communications service ("PCS") C block auction, the Commission established the rules of the deal to be entered by C block auction bidders.

Now, a number of those bidders are asking the Commission to lower the bids they placed in the C block auction, but to permit them to retain the licenses won with the higher bids in the first place. These parties want the benefits of bidding high with the burdens of bidding low. Notably, just two or three months ago, many of these same parties asked the Commission for much more modest relief, arguing that annual payments or interest deferral would keep them on their feet. Now that a proceeding is actually underway, however, these parties have greatly increased their demands. So soon after their more modest requests — and so soon after the auction itself — the Commission should be skeptical of these broad demands for debt forgiveness.

Indeed, among the many proposals for relief described in the Comments and at the Commission's June 30, 1997, Public Forum on this issue, nearly all of them contemplate a dramatic write-off of some licensees' bid amounts. It is said that only such drastic relief will save these C block bidders. Yet, the Commission is not authorized to provide such relief, and the Commission itself has said that it lacks the expertise to assess the validity of myriad business plans. Moreover, the Commission has no evidence on the record that the various requests for relief will actually succeed in rescuing bidders who have made not one installment payment. At bottom, the Commission should not be persuaded that the sky is falling because some bidders are overextended. The Commission crafted rules for just such an event, and it is time that those rules are enforced.

## **II. THE COMMISSION SHOULD BE WARY OF RAPIDLY CHANGING PROPOSALS FOR RELIEF**

A review of the Comments filed in this proceeding reveal that the C block licensees who do not want to be held to their bids have greatly expanded their requests for relief in the space of three months. Some licensees act as though they never made earlier proposals for relief to the Commission, while others acknowledge their previous submissions. Still other parties suggest that the passage of a mere two months has dramatically worsened the financial picture for overextended bidders. All of these groups would have the Commission believe that their current proposals are their final proposals. The Joint Commenters urge the Commission to be skeptical.

On March 13, 1997, for example, NextWave Communications, Inc. ("NextWave"), Eldorado Communications, L.L.C. ("Eldorado"), Indus, Inc. ("Indus"), DCR PCS, Inc. ("DCR"), R & S PCS, Inc. ("R & S"), and Alpine PCS, Inc. ("Alpine") delivered a letter to the Commission in which they asked that their installment payments be moved from a quarterly schedule to an annual schedule.<sup>1</sup> These parties wrote that:

Moving from a quarterly to an annual payment schedule is a modest reformation of the Payment Plan Notes and Security Agreements. It conforms to the simple annual interest calculation on which existing payments are based, and it keeps the government whole in terms of the amount of funds collected from each licensee. Granting

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<sup>1</sup>. See Letter from Thomas Gutierrez, Esq., et al. to Michele C. Farquhar, Chief, Wireless Telecommunications Bureau (Mar. 13, 1997) ("Gutierrez Letter").

the request would not reduce the amount any licensee would pay.<sup>2</sup>

According to the moving parties, "modification of the installment plan to provide for annual payments will provide small businesses with greater flexibility to time their fund raising activities around favorable market conditions or when competition for funding is less congested."<sup>3</sup> The Wireless Bureau requested comment on this proposal.

In their own comments filed on June 23, however, each of these parties abandons their March 13 request to seek much more dramatic relief. NextWave, for example, never again mentions its March 13 letter, urging the Commission to consider instead either (i) deferring interest payments for eight years and amortizing interest and principal over years nine through twenty,<sup>4</sup> or (ii) a substantial "discount" off its bid amounts.<sup>5</sup> NextWave assures the Commission that it "can accept either plan."<sup>6</sup> Perhaps more notably, having convinced the Commission of the need to suspend installment payments in March, NextWave now complains that:

one unintended consequence of the positive recent FCC decision to suspend the license repayment plan has been

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<sup>2</sup>. Id. at 4.

<sup>3</sup>. Id. at 3.

<sup>4</sup>. Comments of NextWave Telecom, Inc., at 4 (filed June 23, 1997).

<sup>5</sup>. Id. at 9.

<sup>6</sup>. Id. at 3. NextWave also now believes that the Commission must completely change the broadband PCS C block ownership and attribution rules. Id. at 21.



exacerbation of the capital markets' level of uncertainty and reluctance to finance new wireless start-ups.<sup>7</sup>

Against this background, the Commission should anticipate that NextWave will have a new restructuring proposal next month, or that NextWave will even use its own proposals today as evidence of the problem tomorrow.

Other proponents of the annual payment scheme also seem to have walked away from their March 13 submission. Eldorado now asks the Commission to suspend all interest payments until the end of the fifth year of the license and to suspend all principal payments until year ten.<sup>8</sup> Similarly, Indus now argues in favor of deferring all payments for six years and urges the Commission to change its broadband PCS C block ownership and transfer rules.<sup>9</sup> DCR contends today that its bids must reflect the fair market value of its licenses, arguing that "the amount of the debt and the payment plan must be designed so that it will be feasible for the licensees to operate their businesses."<sup>10</sup> And, R & S now writes in favor of suspending installment payments for five years, extending the repayment period to fifteen years, and "adjust[ing]" C block bids to reflect A and B block prices.<sup>11</sup> In

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<sup>7</sup>. Id. at 13 n.21.

<sup>8</sup>. Comments of Eldorado Communications, L.L.C., at 2 (file June 23, 1997).

<sup>9</sup>. Comments of Indus, Inc., at 3 (filed June 23, 1997).

<sup>10</sup>. Comments of Pocket Communications, Inc., Debtor-in-Possession, at 3 (filed June 23, 1997) (emphasis added).

<sup>11</sup>. Petition for Waiver and Comments of R & S PCS, Inc., at 21-22 (filed June 23, 1997).

the end, only Alpine acknowledges its March 13 letter,<sup>12</sup> but even Alpine cannot resist supporting a five year moratorium on payments.<sup>13</sup>

As notable as these shifts in position is the decision of MCI Communications Corporation ("MCI") fundamentally to alter its proposal in this matter. On May 1, 1997, MCI delivered a letter to the Commission suggesting a deferral of broadband PCS C block installment payments for five years and the amortization of interest and principal over years six through ten as a means to assist overextended licensees "without changing the bid purchase price."<sup>14</sup> In Comments filed on June 23, 1997, however, MCI urged the Commission to "adjust" C block bids to a level below those for A and B block licenses.<sup>15</sup> MCI added, "Although MCI's [May 1] proposal would have resulted in each C-Block licensee paying the full bid amount by the end of the initial license term, we now believe that this will be 'too little, too late.'"<sup>16</sup>

Thus, it appears that many of the parties seeking relief from the Commission are in such dire financial condition that they cannot even be certain about what form of relief they need

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<sup>12</sup>. Comments of Alpine PCS, Inc., at 9 (filed June 23, 1997).

<sup>13</sup>. Id.

<sup>14</sup>. Letter from Leonard S. Sawicki, Director, FCC Affairs, MCI Telecommunications Corporation, to William F. Caton, Secretary, Federal Communications Commission 2 (May 1, 1997).

<sup>15</sup>. Comments of MCI Communications Corporation at 3 (filed June 23, 1997).

<sup>16</sup>. Id. at 2.

from month to month. The Commission should consider this record when gauging whether these parties should be afforded relief at all. The Commission also should consider whether these parties will not return for new or different relief in August or September as their thoughts on what concessions they would like from the Commission continue to unfold. Most importantly, the Commission should consider the extent to which these parties are likely to make good on their promises rapidly to provide service to the public.

Moreover, the Joint Commenters urge the Commission to utilize the record developed in this proceeding to begin a true notice and comment rulemaking on the issues introduced here. Plainly, many of the parties requesting relief from the Commission have abandoned their demand for new payment dates in favor of advocating wholesale revisions to the Commission's competitive bidding rules. Current and future bidders should have the benefit of a detailed Notice of Proposed Rulemaking from the Commission in advance of addressing changes of this magnitude. The perpetually evolving demands for relief featured here could never suffice for that purpose. CIRI filed a petition for rulemaking on May 7, 1997, asking the Commission to conduct a notice and comment rulemaking to address the payment issues implicated in this matter. The Joint Commenters urge the Commission to begin such a rulemaking as soon as possible.

### **III. THE COMMISSION SHOULD CAREFULLY EXAMINE THE FACTUAL UNDERPINNINGS OF THE REQUESTS FOR RELIEF**

One important benefit to conducting a notice and comment rulemaking would be to permit the Commission carefully to examine the factual underpinnings of the various requests for relief. Some bidders argue that a dramatic financial "meltdown" has made their bids uneconomic, while other bidders contend that "changed circumstances" warrant reconsideration of the Commission's rules. Still other bidders comment that they are prepared to pay their installment payment obligations in a timely manner, but would appreciate relief nonetheless. The Joint Commenters urge the Commission to be skeptical of bidders who disclaim any responsibility for their current problems.

#### **A. The Sky is not Falling for Broadband PCS C Block Licensees**

As a threshold matter, some broadband PCS C block bidders would have the Commission believe that truly catastrophic changes have occurred within the wireless telecommunications markets. Pocket complains that "[m]arket conditions with respect to the wireless industry (including but not limited to PCS) have changed substantially since the C block auction"<sup>17</sup> and NextWave asserts that the public equity market for wireless telecommunications "erode[d] in late 1996 and 1997."<sup>18</sup> General Wireless, Inc., complains only about "major changes in the financing

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<sup>17</sup>. Pocket Comments at 2.

<sup>18</sup>. NextWave Comments at 12.

environment,"<sup>19</sup> while Meretel Communications Limited Partnership asserts that market conditions "have changed dramatically" since the Commission crafted its installment payments.<sup>20</sup> Each of these parties would have the Commission believe that the sky has already fallen for wireless companies. That, however, may not be the case.

First, telecommunications stocks have enjoyed a bull market resurgence even in the time this proceeding has been underway. On June 30, 1997 — the day of the Commission's Public Forum in this matter — RCR, a wireless industry trade journal, reported:

During the past 10 weeks, RCR's index of 80-plus key telecom stocks has leapt nearly 200 points — or 15 percent. An increasing number of telecom companies have seen meteoric increases in the price of their stock in recent days. As of June 25, 28 RCR index companies were trading within 10 percent of 52-week highs while only five were hovering within 10 percent of 52-week lows. As of late last week, seven RCR index telcos were trading at 52-week highs.<sup>21</sup>

Against this background, the Commission should be quite cautious of claims that the markets are irreversibly closed to all C block bidders.<sup>22</sup> Indeed, since the close of the C block auction, no

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<sup>19</sup>. Comments of General Wireless, Inc. ("GWI") at 3 (filed June 23, 1997).

<sup>20</sup>. Comments of Meretel Communications Limited Partnership ("Meretel") at 4 (filed June 23, 1997). See also Comments of Fortunet Communications, L.P. ("Fortunet") at 3 (filed June 23, 1997) ("Financial markets have tightened").

<sup>21</sup>. George Lurie, Wireless Stocks Start to Climb Charts, RCR, June 30, 1997, at 1, 45 (attached as EXHIBIT A to this pleading).

<sup>22</sup>. Cf. Petition for Waiver and Comments of R & S PCS, Inc. ("R & S") at 5 (filed June 23, 1997) ("it is likely that there will be further constriction of the limited funds available for

fewer than twenty wireless service providers have completed public or private equity offerings or private debt offerings, yielding \$6.7 billion in new funding.<sup>23</sup> This suggests that the market has not been closed for companies with strong business plans.

Indeed, the lack of such a plan might have contributed to the troubles of some C block bidders. During the C block auction, the market for wireless issues — and particularly for shares in broadband PCS licensees — clearly was operating on a speculative track. The price per share of Omnipoint Corporation stock, for example, was viewed by many broadband PCS speculators as a benchmark for C block values, while the resulting C block bids were viewed as an indicator of the value of Omnipoint stock.<sup>24</sup> This dynamic of mutual valuation support plainly had an upward spiraling affect on the intensity of the C block speculation. The subsequent relaxation of this speculative tension is much more probably a return to normalcy than a dramatic "market meltdown."

At bottom, wireless stocks have always been volatile, and bidders exercising sound business judgment should anticipate that markets move both up and down. Notably, in the weeks before the start of the broadband PCS C block auction, the share price of

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C-Block investment").

<sup>23</sup>. See EXHIBIT B to this pleading.

<sup>24</sup>. See Remarks of John M. Bensch, Vice President, Senior Wireless Service Analyst, Lehman Brothers, at the June 30, 1997, Public Forum.

InterCel, Inc.,<sup>25</sup> lost nearly one-quarter of its value. The high from which it fell was double that of the price per share twelve months earlier. Nevertheless, some C block bidders ignored this type of bad news, concentrating instead on placing higher bids in the hope of Omnipoint-like valuations. As John Bensche explained in the Commission's Public Forum:

[T]here was a risk you were taking — a market risk — that the markets would be there for you to finance you at that level, and the market didn't stay there. So you took market risk and it went against you. And when you take market risk and it goes against you, you lose money.<sup>26</sup>

These parties analyzed their options, accepted the risk that the market would not last, and continued bidding at high levels.<sup>27</sup>

According to GWI, "[b]ased on then-existing capital market conditions . . . GWI reasonably anticipated that additional sources of capital . . . would be available."<sup>28</sup> The fact that the market moves up and down is hardly a new development, however, and underwriting this "market risk" is not the job of the Commission.

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<sup>25</sup>. GWI includes InterCel in its graph of "Public Market Enterprise Valuation." See GWI Comments, Exhibit A.

<sup>26</sup>. Bensche Remarks, Public Forum.

<sup>27</sup>. See, e.g., GWI Comments at 2 ("GWI's bids were submitted based on thorough demographic analysis, financial projections and consultation with third party advisors").

<sup>28</sup>. Id. at 2-3.

**B. There are no Changed Circumstances to Warrant  
Reconsideration of the Commission's Rules**

Some commenters argue that the Commission must revisit its broadband PCS C block installment payment plan because circumstances affecting licensees have changed,<sup>29</sup> and many others contend that "unforeseen" problems have limited their ability to make good on their auction bids. In all of these cases, the commenters insist that it is somehow incumbent upon the Commission to change its competitive bidding payment rules rather than to enforce them. Even a cursory review of the facts of this matter, however, makes clear that there are no "changed circumstances" to warrant reconsideration of the Commission's rules.

One party arguing that circumstances affecting licensees have "changed" writes:

While it had been assumed that the A, B, and C Block licensees would be awarded substantially concurrently, in point of fact the C block licenses were awarded substantially later, giving the A and B Block licensees preferential access to the consumer and financial markets.<sup>30</sup>

It hardly bears noting that the award of broadband PCS A and B block licenses was not a secret to prospective C block bidders. Indeed, A and B block licenses were awarded on June 23, 1995, four and one-half months prior to the date on which C block bidders submitted their auction applications and six months prior

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<sup>29.</sup> See, e.g., Comments of Chase Telecommunications, Inc. ("Chase") at 10-11 (filed June 23, 1997); Indus Comments at 9-10.

<sup>30.</sup> Chase Comments at 10-11.



to the date on which they placed their first bids. Any circumstances that "changed" by virtue of the A and B block auction were certainly not concealed from bidders until after the C block auction.

Another party writes, "The perception of market value of the C Block spectrum was further eroded by the Commission announcement that additional wireless spectrum would be auctioned."<sup>31</sup> Yet, the pendency of wireless auctions after the broadband PCS C block auction generally was a matter of common knowledge. With the possible exception of the congressionally-mandated auction of Wireless Communications Service spectrum — which is widely perceived as incapable of supporting mobile offerings — C block bidders understood that the Commission would auction broadband PCS D, E, and F block spectrum after the C block auction, and that additional spectrum with other potential was slated for auction thereafter. Unless these broadband PCS C block licensees truly thought that the C block was going to be the Commission's final auction, they are hard-pressed now to complain that "circumstances have changed."<sup>32</sup>

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<sup>31</sup>. Meretel Comments at 4.

<sup>32</sup>. In its Comments, NextWave writes:

although it also may be reasonable to expect that auction participants should anticipate that additional spectrum will come to market over time, no one, not even the Commission, could have anticipated the impact of the Congressionally mandated 2.3 GHz auctions.

NextWave Comments at 18-19 (footnote omitted). NextWave filed its first request for payment relief on March 13, 1997; the 2.3 GHz auction did not begin until April 15, 1997.

Still other broadband PCS C block licensees argue that "factors beyond their control" rendered their auction bids unpayable. Fortunet, for example, submits that competing for capital with A and B block licensees is difficult and that "the Commission's rules restrict the financing options available to C-Block licensees."<sup>33</sup> Meretel, on the other hand, complains that:

the significant increase in the auctioned price of C Block licenses as compared with the results of the A/B auction has affected negatively the market's perception of the viability of new licensees facing four established competitors. Early C Block defaults and current financial difficulties of major C Block licensees reinforce market cynicism.<sup>34</sup>

And, Alpine comments, "PCS licensees must build substantially more transmission sites to cover an area than cellular licensees. This results in substantially higher facilities' costs for PCS licensees."<sup>35</sup>

As the Commission has explained in other contexts, however, the operational headstart of cellular and broadband PCS A and B block licensees, the details of the Commission's ownership rules, the need to fund system construction, and the prospects for post-auction financing are matters that a prudent businessperson would investigate prior to committing millions (or billions) of dollars for wireless licenses. According to Common Carrier Bureau, "The

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<sup>33</sup>. Fortunet Comments at 3-4.

<sup>34</sup>. Meretel Comments at 4.

<sup>35</sup>. Alpine Comments at 4. Similarly, on March 13, 1997, Alpine, NextWave, DCR, and others argued to the Commission that the "greater immediate capital allocation toward auction payments necessarily diminishes the resources available for infrastructure development . . . ." Gutierrez Letter at 3.

exercise of due diligence prior to participating in an auction is very much in the public interest and we wish to do nothing that would discourage such conduct."<sup>36</sup> As to Meretel's suggestion that the C block bids themselves — and resulting financial instability — warrant a waiver of the Commission's rules, the Commission should not establish that the exercise of poor business judgment qualifies as a "changed circumstance" sufficient to override settled Commission policy.

At bottom, it cannot reasonably be said in this instance that a "significant factual predicate of a prior decision has been removed,"<sup>37</sup> or that "abnormal circumstances" have made reexamination of the Commission's regulations "imperative."<sup>38</sup> The Commission adopted installment payments because of "the enormous costs of broadband PCS and the likelihood of very large participants in the other blocks,"<sup>39</sup> noting that "[i]t will be extremely challenging for any entrepreneurs' block participant to compete . . . ."<sup>40</sup> With installment payments, however, many C

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<sup>36</sup>. Requests for Waivers in the First Auction of 594 Interactive Video and Data Service Licenses, Order, 9 FCC Rcd 6385 (Com. Car. Bur. 1994) ("IVDS Order").

<sup>37</sup>. Bechtel v. FCC, 957 F.2d 873, 881 (D.C. Cir. 1992) (quoting WWHT, Inc. v. FCC, 656 F.2d 807, 819 (D.C. Cir. 1981)).

<sup>38</sup>. Geller v. FCC, 610 F.2d 973, 979 (D.C. Cir. 1979).

<sup>39</sup>. Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Report and Order, 9 FCC Rcd 5532, 5592 (1994).

<sup>40</sup>. Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, 459 (1994).

block bidders are competing. Even some parties who favor payment relief in this matter acknowledge that they planned for and are able to pay their C block license obligations to the Commission in a timely fashion.<sup>41</sup> The fact that some C block bidders cannot do so does not undermine the validity of the Commission's rules.<sup>42</sup>

In March, Commissioner Ness made clear that adherence to the Commission's rules in this context is crucial:

Regulatory certainty is critical to entrepreneurs and the financial community. Particularly in the auction environment, business plans are made and commitments signed weeks and months in advance of auction. While it is tempting to "fine tune" our rules every time we have a better idea, we must recognize that each rule change alters the assumptions on which business plans were built. Revisions intended to benefit bidders may have the opposite effect. Worse, marketplace behavior may

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<sup>41</sup>. See, e.g., Comments of Horizon Personal Communications, Inc., at 2 (filed June 23, 1997) ("Horizon is well along in the design and construction of its broadband PCS network, and is prepared to pay for its licenses in accordance with the terms of its current notes and security agreements"); Comments of the Small Business Coalition at 5 (filed June 23, 1997) ("Coalition members . . . developed prudent business plans designed to accomplish their respective goals. These plans incorporated expected capital costs as well as anticipated market conditions. As a result, Coalition member are well prepared to meet their debt-service obligations and do not face the 'crisis' that is suggested to be hovering on the horizon for PCS licensees").

<sup>42</sup>. Moreover, the fact that some bidders cannot satisfy the Commission's payment requirements itself is not a new development. Compare BDPCS, Inc., Application for Review at 4-5 (filed June 28, 1996) ("BDPCS reasonably believed that it would be capable of meeting the FCC's financial requirements of a PCS high bidder") with GWI Comments at 2-3 ("GWI reasonably anticipated that additional sources of capital -- both public and private -- would be available to finance the company's start-up costs and debt obligations"). The Commission granted no relief to BDPCS. BDPCS, Inc., Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission's Rules, Memorandum Opinion and Order, 12 FCC Rcd 3230 (1997).

begin to reflect the assumption that our rules will continue to evolve and that there is no need to comply with those already on the books. That would be grossly unfair to those who diligently follow the rules as written, and would unduly reward those who camp out on the Commission doorstep.<sup>43</sup>

In this context, the Commission should not suggest that its "rules will continue to evolve," even as some bidders "camp out on the Commission doorstep" for relief. Many licensees have paid their obligations under the rules; that some bidders have not reflects not on the rules but on the bidders themselves.

**IV. THE COMMISSION HAS NEITHER THE LEGAL AUTHORITY NOR THE FINANCIAL EXPERTISE TO COMPROMISE C BLOCK DEBT**

**A. The Debt Collection Act Limits the Commission's Authority to Compromise a Claim to the Government**

As the Joint Commenters noted in their initial Comments<sup>44</sup> — and as BellSouth Corporation ("BellSouth") explained more fully in its filing<sup>45</sup> — the Commission does not have the legal authority to compromise broadband PCS C block payment obligations in a meaningful way. The Debt Collection Act provides that the head of a federal agency "shall try to collect a claim of the United States Government for money or property arising out of the activities of, or referred to, the agency."<sup>46</sup> Thereafter, the

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<sup>43</sup>. Susan Ness, Spectrum Management - Myths and Realities, Speech to the Cellular Telecommunications Industry Association Wireless '97, 7 (Mar. 3, 1997) (emphasis added).

<sup>44</sup>. Comments of Joint Commenters at 28.

<sup>45</sup>. Comments of BellSouth Corporation at 10-13 (filed June 23, 1997).

<sup>46</sup>. 31 U.S.C. § 3711(a)(1). The term "claim" includes "funds owed on account of loans made . . . by the Government," id., § 3701(b)(1)(A), and any "amounts of money or property owed

head of a federal agency "may compromise a claim of the Government of not more than \$100,000 (excluding interest) or such higher amount as the Attorney General may from time to time prescribe . . . ." <sup>47</sup>

Without addressing the Debt Collection Act, NextWave argues that "the Commission has all legal authority necessary to restructure C and F block payments." <sup>48</sup> Relying variously on the Commission's authority under Section 309(j) of the Communications Act to conduct spectrum auctions, <sup>49</sup> under Section 303(r) to conduct rulemakings, <sup>50</sup> and under Section 4(i) to take action necessary to the execution of its functions, <sup>51</sup> NextWave concludes that "there is no question but that the Commission possesses all authority necessary to effectuate the revised payments plans here at issue." <sup>52</sup>

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to the Government." Id., § 3701(b)(1)(G). See also 47 C.F.R. § 1.1901(e) (same).

<sup>47.</sup> Id., § 3711(a)(2). The regulations promulgated by the Comptroller General and the Department of Justice under the Debt Collection Act provide that "[e]ach Federal agency shall take aggressive action, on a timely basis with effective followup, to collect all claims of the United States for money . . . ." 4 C.F.R. § 102.1(a). These regulations also set forth specific standards and procedures for compromising claims to the government under the Debt Collection Act. 4 C.F.R. §§ 103.1-103.9.

<sup>48.</sup> NextWave Comments at 25. See also id. at 24-27.

<sup>49.</sup> Id. at 25.

<sup>50.</sup> Id.

<sup>51.</sup> Id. at 26.

<sup>52.</sup> Id. at 27 (footnote omitted).

Notwithstanding NextWave's conclusion, however, it is highly unlikely the Congress intended for these quite general provisions of the Communications Act to overcome the highly specific directives and limitations set forth in the Debt Collection Act. Nothing in the Debt Collection Act provides that its terms apply to all federal agencies except the Commission, and the Communications Act does not purport to be a source of collection authority. Indeed, the Commission's own rules provide that, upon default, "the Commission will initiate debt collection procedures pursuant to part 1, subpart O,"<sup>53</sup> which, in turn, expressly rely on the Debt Collection Act and the regulations promulgated thereunder.<sup>54</sup> The Commission even cites the Debt Collection Act as the source of authority for Part 1, subpart O. Against this background, NextWave cannot reasonably argue that the Commission is free to compromise its debt without regard to the statutory limitations in Title 31.

**B. The Commission has Denied Having the Financial Expertise to Judge Licensees' Business Plans**

In addition to lacking statutory authority, the Commission may not have the financial expertise to approve parties' business plans. At the center of the many proposals to restructure licensees' payment plans or simply to write down licensees' bid amounts would be a determination by the Commission that the contemplated relief will actually assist a licensee in paying its

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<sup>53</sup>. 47 C.F.R. § 1.2110(e)(4)(iii).

<sup>54</sup>. Id., § 1.1904.

bills and providing service. As a result, the Commission is being asked by all parties that want new bid amounts or payment schedules to evaluate their business plans and their likelihood of success in a restructured environment. Previously, however, the Commission itself has denied any expertise in this regard.

For example, in the Notice of Proposed Rule Making in its recent Part 1 auction rules proceeding, the Commission proposed simplifying its grace period relief rules because

[t]he Commission or its designee may not have the necessary resources to evaluate a licensee's financial condition, business plans, and capital structure proposals.<sup>55</sup>

More specifically, announcing the Commission's regulatory agenda for 1997, Chairman Hundt wrote:

[Auction bidders] now owe the Federal government substantial sums for their licenses. . . . [S]ome competitors will need temporary financial relief and others may seek to renegotiate the terms of their loans, just as businesses do in every sector of the economy. The Commission, however, does not necessarily have the experience or the staff to assume these responsibilities. . . . As these new competitors develop their businesses and begin making their installment payments, perhaps they should be able to request renegotiation of their financing where it is necessary and appropriate to do so. That request is best made to a commercial lender, and not the FCC.<sup>56</sup>

Thus, the Commission has not hesitated to make clear that it does not have "the experience or the staff" to judge "business plans"

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<sup>55</sup>. Amendment of Part 1 of the Commission's Rules - Competitive Bidding Proceeding, Order, Memorandum Opinion and Order, and Notice of Proposed Rule Making, FCC 97-60, ¶ 74 (rel. Feb. 28, 1997) ("Part 1 NPRM").

<sup>56</sup>. Reed E. Hundt, *The Hard Road Ahead - An Agenda for the FCC in 1997*, 26 (Dec. 26, 1996) (emphasis added).



or "capital structure proposals." As the Commission wrote in another auction case, "the government cannot guarantee the financial success of widely differing business plans or prospects."<sup>57</sup>

Against this background, a reviewing court likely will not afford much deference to the Commission's determination that a specific C block licensee will benefit from a particular new capital structure. Since Commission itself has acknowledged its own lack of expertise in this area — and even has undertaken to amend its rules to avoid having to make such financial judgments in the future — it will be difficult to argue later that its judgment is entitled to great weight. "Deference is appropriate when the agency has expertise in a particular area or the Congress has entrusted the agency to administer a particular statute."<sup>58</sup> Where neither condition obtains, no such deference is appropriate.<sup>59</sup>

To date, none of the three major broadband PCS C block bidders seeking relief here have presented anything resembling a commercially-reasonable business plan to the Commission. The Commission is being asked to write-off several billion dollars in expected federal funds simply on the promise of these companies

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<sup>57</sup>. IVDS Order, 9 FCC Rcd at 6386.

<sup>58</sup>. Cellwave Telephone Services, L.P. v. FCC, 30 F.3d 1533, 1537 (D.C. Cir. 1994) (citations omitted).

<sup>59</sup>. Id.